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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

NO. 76-1168

STATE OF ARIZONA, RICHARD BOYKIN,
SHERIFF, PIMA COUNTY, ARIZONA

Petitioner,

-vs-

GEORGE WASHINGTON, JR.

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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CITATIONS

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on December 3, 1976. A timely petition for rehearing was denied on January 20, 1977 and the original majority opinion was amended at this time. This petition for certiorari was timely filed. This Court's jurisdiction is invoked under Title 28, United States Code, Section 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether the reviewing court must look to the whole record and all the circumstances of the case rather than the specific finding of the trial judge in determining whether there was an abuse of discretion in declaring a mistrial so as to bar a retrial under the Double Jeopardy Clause.

2. Whether the trial judge must use talismanic words such as "manifest necessity", "ends of public justice" or "jury is improperly influenced by conduct of counsel so as to be unable to render an impartial verdict" prior to granting a mistrial so as not to bar a retrial under the double jeopardy clause.

3. After counsel argue as to possible alternatives to the granting

of a mistrial, i.e., jury admonition, is the trial judge required to make a specific finding as to his rejection of these alternatives or is this rejection implicit in the granting of a mistrial?

4. Where defense counsel intentionally engages in conduct calculated to necessitate a mistrial, should not the defendant be barred from raising a Double Jeopardy defense?

TABLE OF AUTHORITIES INVOLVED

Fifth Amendment to the United States Constitution.

Rule 48 (c), Arizona Rules of the Supreme Court.

Rule 314, Arizona Rules of Criminal Procedure.

Udall, Arizona Law of Evidence, § 111.

[See Appendix].

STATEMENT OF THE CASE

The Appellee, George Washington, Jr., was charged with murder on February 1, 1971. Prior to trial the appellee moved for production of all Brady materials under Brady v. Maryland, 373 U.S. 83 (1963). The prosecution denied the possession of any Brady material. The trial began and the appellee was found guilty of first degree murder on May 21, 1971.

The appellee appealed to the Arizona Supreme Court where the case was remanded for a hearing on the Appellee's motion for a new trial. The trial judge granted the motion which was affirmed on June 20, 1974 by the Arizona Supreme Court.

On November 13, 1974, the Appellee Washington filed a motion to dismiss, in the Superior Court of Arizona, contending that the double jeopardy clause prohibited his re-prosecution and that he had been denied a speedy trial. On December 13, 1974, this motion to dismiss was denied.

The second trial began on January 7, 1975. During the voir dire of the jury the prosecutor informed the jurors that four years had passed since the commission of the crime and that the memories of witnesses were likely to fade. While explaining the ideas of impeachment and refreshing recollection, the prosecutor mentioned that the witnesses had been involved in "two prior proceedings." The defense counsel moved for a mistrial based on the reference to "two prior

proceedings" which motion was denied.

Defense counsel, in his opening statement, stated to the jury that in the first trial of George Washington, Jr., the Arizona Supreme Court had granted a new trial because the prosecutor had "suppressed and hidden evidence" and that this evidence had been "purposely withheld" from the defendant.

The State moved for a mistrial on the grounds that the highly prejudicial misconduct of defense counsel precluded any possibility of achieving a fair and impartial trial. The motion was denied although the court did express concern that the trial was becoming one of the County Attorney's office rather than of the defendant.

The State renewed its motion for a mistrial the following morning. Extensive argument was made by the prosecutor and the defense as to the effect of defense counsel's improper remarks on the jury and possible alternatives to the granting of a mistrial such as a cautionary instruction to the jury. The court granted the motion for the mistrial finding:

> "Based upon defense counsel's remarks in his opening statement concerning the Arizona Supreme Court opinion and its effect for the reasons for the new trial, the motion for mistrial will be granted."

A petition for special action was filed by the Appellee before the Arizona Supreme Court on January 24, 1975, in which he claimed that the double jeopardy clause and the due process clause of the United States

Constitution barred a retrial of the Appellee. This petition for special action was denied on February 19, 1975.

The jurisdiction of the federal court was then invoked in the following manner. On April 4, 1975, the Appellee filed a petition for a writ of habeas corpus in the federal district court. This petition was held without further action until possible State remedies were exhausted. A motion to quash was then filed by the Appellee on May 5, 1975 based on double jeopardy in the Superior Court of Arizona. On June 16, 1975, Judge Ben C. Birdsall denied the motion to quash after oral argument. On June 26, 1975, the Appellee filed a petition for a writ of habeas corpus in the Arizona Supreme Court. This petition was

denied on July 14, 1975 after oral argument on the same double jeopardy issue. The Appellee then returned to the United States District Court for a writ of habeas corpus based on the double jeopardy issue which was granted on October 17, 1975.

On November 11, 1975, the State of Arizona appealed an order denying the State's motion to reopen evidence and the granting of the petition of writ of habeas corpus to the United States Court of Appeals for the Ninth Circuit.

On appeal, the Ninth Circuit agreed that the remarks made by the defense counsel were improper under Arizona law but found that the mistrial was improperly granted since no specific findings were made by the trial judge. The Ninth Circuit, in

affirming the Court below, held that "manifest necessity or ends of public justice" the test of United States v. Perez, 9 Wheat 579, 6 L.Ed.165 had not been met. The Ninth Circuit relied on United States v. Jorn, 400 U.S. 470 (1971) in reaching its decision.

REASONS FOR GRANTING THE WRIT

1. The Decision of the Ninth Circuit Court of Appeals in the case at bar is in direct conflict with United States Supreme Court decisions as to the standards for the granting of a mistrial.

The test as to when there can be a new trial after a mistrial has been declared under the double jeopardy clause was stated by this Court in United States v. Perez, supra. The validity of a mistrial depends on whether in light of all the circumstances "there is a manifest necessity for the [mistrial], or the ends of public justice would otherwise be defeated." United States v. Dinitz, _____ U.S. _____, 96 S.Ct. 1075, 1079, 47 L.Ed.2d 267,

Illinois v. Somerville, 410 U.S. 458, 461, 35 L.Ed. 2d 425, 93 S.Ct. 1066; United States v. Jorn, supra; Gori v. United States, 367 U.S. 364, 368-369, 6 L.Ed. 2d 901, 81 S.Ct. 1523; Wade v. Hunter, 336 U.S. 684 at 689-690, 93 L.Ed. 974, 69 S.Ct. 834; Simmons v. United States, 142 U.S. 148, 153-154, 35 L. Ed. 968, 12 S.Ct. 171.

The holding of the Ninth Circuit Court of Appeals in the case at bar is contrary to the test mandated by this Court. Because the trial judge failed to specifically state the basis for his finding of "manifest necessity", the Ninth Circuit Court of Appeals held that the Perez, supra standard

had not been met and so the double jeopardy clause precluded a retrial of the Appellee. An analysis of Supreme Court case law will demonstrate that the Ninth Circuit Court of Appeals misapplied the mistrial test mandated by this Court.

In Illinois v. Somerville, supra, this Court upheld the trial judge's declaration of a mistrial as meeting the Perez, supra ,"manifest necessity" test. In Somerville, supra, a defect in the indictment under Illinois law could have been asserted on appeal to overturn a final judgment of conviction. This Court held that the "ends of public justice" would be defeated by continuing the trial. In reversing the Seventh Circuit

Court of Appeals, the Court emphasized that rigid mechanical rules regarding mistrials would not be followed, but rather, a general approach premised on reasonable state policy was appropriate. 410 U.S. 458 at 429-430. The Ninth Circuit Court of Appeals refused to apply this holding in the case at bar.

The policy of the State of Arizona is to preclude any reference by counsel to evidence which has no bearing on the case in issue. Udall, Arizona Law of Evidence, § 111 at 201 (1960). Rule 48 (c), 17 A.R.S. Rules of the Supreme Court and Rule 314, 17 A.R.S. Rules of Criminal Procedure would have required the exclusion of the prior Arizona Supreme Court memorandum decision and evidence of alleged prosecutorial misconduct. In reliance on these

rules and the highly prejudicial quality of the defense counsel's remarks, the trial judge granted the mistrial. The Ninth Circuit Court of Appeals admits that the statements were improper, but held that since the trial judge neither (1) specifically ruled that the jury was prevented from arriving at a fair and impartial verdict nor (2) specifically found that no other alternatives were appropriate that the "manifest necessity" test had not been met.

This holding is clearly in conflict with Somerville, supra, where this Court stated that "a trial judge properly exercises his discretion to declare a mistrial if an impartial verdict cannot be reached..." 410 U.S. 458 at 464. Implicit in the trial judge's ruling was a finding that an impartial verdict could not be reached by the jury. Under Somerville, supra, if the trial judge reasonably could have concluded that the ends of public justice would be defeated by continuing with the trial then the mistrial must be upheld. Based on the trial record in the case at bar, the trial judge was certainly justified in granting a mistrial.

The trial judge in the instant case patiently listened to argument by counsel and obviously decided that

an impartial verdict could not be reached. The trial judge obviously decided that a cautionary instruction to the jury would not cure the prejudice and so declared a mistrial. This exercise of discretion was clearly within the mandates of Somerville, supra, and Perez, supra.

The defense counsel in the instant case intentionally engaged in conduct calculated to necessitate a mistrial. In his opening statement defense counsel stated to the jury that in the prior trial the Arizona Supreme Court had ruled that the prosecutor had "purposely withheld" evidence. These statements were highly improper and not susceptible of proof. The statements were also irrelevant, incompetent and immaterial to the

issue of guilt or innocence of the defendant.

Where the intentional conduct of defense counsel necessitates a mistrial, the defendant should be barred from raising a double jeopardy defense. United States v. White, 524 F.2d 1249 (5th Cir. 1975). In United States v. Dinitz, _____ U.S. _____, 47 L.Ed.2d 267, 96 S.Ct. _____ (1976), the mistrial was granted by the trial judge based on the repeated misconduct of the defense attorney in his opening statement. This Court stated in Dinitz, supra,that so long as the record did not reflect bad faith conduct by the judge or the prosecutor, the trial judge's ruling would be upheld. Where the judge's action in banishing the defense attorney which led to the mistrial was based on the

the improper conduct of defense counsel a retrial of the defendant was proper.

The importance of excluding prejudicial conduct of counsel from the jury was succinctly stated by Mr. Chief Justice Berger in his concurring opinion in United States v. Dinitz, supra, where a mistrial was validly granted:

> "An opening statement has a narrow purpose and scope. It is to state what evidence will be presented, to make it easier for the jurors to understand what is to follow, and to relate parts of the evidence and testimony to the whole; it is not an occasion for argument. To make statements which will not or cannot be supported by proof is, if it relates to significant elements of the case, professional misconduct. Moreover, it is fundamentally unfair to an opposing part to allow an attorney, with the standing and prestige inherent in being an officer of the court, to present to the jury statements not susceptible of proof but intend-

> ed to influence the jury in reaching a verdict.
>
> A trial judge is under a duty, in order to protect the integrity of the trial, to take prompt and affirmative action to stop such professional misconduct." 47 L.Ed.2d 267, 276-77.

The Ninth Circuit in its decision in the case at bar did not consider the fact that defense counsel's intentional conduct caused the mistrial. Under Dinitz, supra, the trial judge should have been upheld unless the reviewing court had found that the mistrial ruling was to harass the defendant or was motivated by bad faith. Such contentions have not been raised at any level of these proceedings.

Gori v. United States, 367 U.S. 364, 81 S.Ct. 1523, 1 L.Ed.2d 901 (1961), is also instructive on the finding of manifest necessity. In Gori, supra, this Court upheld the

retrial of the defendant although the reason for the mistrial was not entirely clear. 367 U.S. 364 at 366.

The Ninth Circuit Court of Appeals specifically relied on United States v. Jorn, 400 U.S. 470, 91 S.Ct. 547, 27 L.Ed.2d 543 (1971), in holding that the trial court record in the case at bar failed to reveal a "scrupulous exercise of judicial discretion." 400 U.S. 470 at 484-5. However, the manner in which judicial discretion was exercised in Jorn, supra, differs substantially from the instant case. In Jorn, supra, the trial judge granted a mistrial, sua sponte, without hearing arguments from counsel and so, this Court concluded that there had been no effort by the judge to exercise a sound discretion. 400 U.S. 470 at 487. The State of Arizona sub-

mits that the Ninth Circuit Court of Appeals' reliance on Jorn, supra, in the case at bar was misplaced and contrary to Perez, supra, and Somerville, supra. This Court in Jorn, supra, looked specifically to the record to determine whether there was a proper exercise of judicial discretion.

> "It is apparent from the record that no consideration was given to the possibility of a trial continuance; indeed, the trial judge acted so abruptly in discharging the jury that, had the prosecutor been disposed to suggest a continuance, or the defendant to object to the discharge of the jury, there would have been no opportunity to do so. When one examines the circumstances surrounding the discharge of this jury, it seems abundantly apparent that the trial judge made no effort to exercise a sound discretion to assure that, taking all the circumstances into account, there was a manifest necessity for the sua sponte declaration of this mistrial." 400 U.S. 470, 487 (emphasis added.)

Jorn, supra, does not hold that a reviewing court may look only to the final order of the trial judge to make a determination if manifest necessity did in fact exist. The reviewing court must look to the record and the "circumstances surrounding the discharge of the jury." 400 U.S. 470 at 487. This, the Ninth Circuit Court of Appeals did not do. In Somerville, supra, this Court refused to accept the reliance on Jorn, supra, stating that:

> "While it is possible to excise various portions of the plurality opinion to support the result reached below, divorcing the language from the facts of the case serves only to distort its holdings." 410 U.S. 458 at 469.

These conflicts between the Ninth Circuit Court of Appeals and Supreme Court justify the grant of certiorari to review the judgment below.

2. The Decision Below Conflicts with the Decisions of Other Courts of Appeals as to when the granting of a mistrial will bar a retrial under the Double Jeopardy Clause of the Fifth Amendment.

Case law in the Second Circuit Court of Appeals is contradictory to the decision in the case at bar. In United States v. Potash, 118 F.2d 54 (2nd Cir. 1941), the appellants contended that double jeopardy must bar a retrial unless the reasons for discharging the jury before verdict were entered in the record. The appellants could cite no double jeopardy authority for their position and the

Second Circuit rejected their argument holding that the proper rule to be applied was whether or not the trial judge openly exercised his discretion in discharging the jury. 118 F.2d 54 at 54. The court looked to the stenographic minutes from which it could be inferred that only eleven jurors had returned to the court room and based on this inference held that the mistrial was properly granted. In Potash, supra, all that the trial judge had stated was that he was sorry "about the outcome of this" and that "under the circumstances" the only thing he could do would be to discharge the jury. 118 F.2d 54 at 55.

In the case at bar the inference as to why the jury was discharged is obvious from the record. The jury had been so potentially prejudiced by

defense counsel's highly improper remarks in his opening statement that they could not render a fair and impartial verdict. The ends of public justice demanded a mistrial. The reviewing court in the case at bar never found an abuse of discretion but instead relied on the fact that the trial judge did not make a specific finding of manifest necessity. Following Potash, supra,such a holding is erroneous because no reference to the record was made in order to infer why the mistrial was granted.

While there was no specific finding by the trial judge in the instant case that the statements were prejudicial, the statements were clearly prejudicial because they were in fact so improper that no specific finding by the trial judge was necessary. The Ninth Circuit found that defense counsel's remarks were improper, however, it erred in declining "to imply from this impropriety that the jury was prevented from arriving at a fair and impartial verdict." [Appendix App. 4 - 5].

The conclusion of prejudice the Ninth Circuit declined to imply is the only logical result after examining the record of counsel's arguments before the trial judge about the prejudicial affect of the defense counsel's remarks and possible alternatives to a mistrial.

The decision of the Ninth Circuit in the instant case is also directly contrary to the Fourth Circuit Opinion of Whitfield v. Warden of Maryland House of Correction, 486 F.2d 1118 (4th Cir. 1973), U.S. cert. den. 419 U.S. 876.

The Fourth Circuit refused to apply United States v. Jorn, 400 U.S. 470, 91 S.Ct. 547, 27 L.Ed.2d 543 (1971),and limited it to its particular factual context. The court in Whitfield was instead influenced by Illinois v. Somerville, 410 U.S. 458, 93 S.Ct. 1066, 35 L.Ed. 2d 425 (1973), and Smith v. Mississippi, 478 F.2d 88 (5th Cir. 1973).

In Whitfield, the trial court and the attorneys were unsure as to whether or not a juror had

overheard motions for judgments of acquittal. The court declared a mistrial when one of the defense attorneys refused to agree to questioning of the juror as to the matter. The district court judge had held that a reprosecution would violate the double jeopardy clause because the trial judge "acted precipitously instead of scrupulously examining the necessity for mistrial" 486 F.2d 1118, at 1122. He emphasized that the trial judge should have interrogated the suspect juror and given more consideration to impaneling an alternate juror or severing the defendants. The Fourth Circuit rejected these arguments, stating that the trial judge was not bound to follow a particular course of

action. 486 F.2d 1118, at 1123. The Fourth Circuit ruled that since the judge did not act sua sponte and listened to arguments of counsel as well as suggesting interrogation of the juror that his declaration of a mistrial satisfied the Perez test.

The Ninth Circuit decision in the case at bar is also in conflict with the Fifth Circuit opinion of Smith v. Mississippi, 478 F.2d 88, U.S. cert. den., 414 U.S. 1113.

The trial judge in Smith, supra, declared a mistrial due to the possible prematurely held opinion of a juror as to an important element of the case. The State made a motion for mistrial and after hearing argument as to the motion and the testimony of the juror who insisted that he had not

formed an opinion, the trial judge granted a mistrial. Although the trial judge did not"articulate with precision" his reasons for granting the mistrial, the Fifth Circuit said that the totality of the circumstances "would militate against the state receiving a fair and impartial trial." 478 F.2d 88 at 91.

The Fifth Circuit refused to rely on Jorn, supra, because in Jorn the trial judge made a sua sponte motion for a mistrial based on no inquiry whatsoever. The Court instead upheld the broad discretion of the trial judge, citing Gori v. United States, supra. In Gori, supra, this court held that although the trial judge was not clear as to his reasons for tranting a mistrial, the discretion of the trial judge in so ruling would be upheld.

The Ninth Circuit Court of Appeals decision in the instant case by strictly applying Jorn, supra,rather than holding that the trial judge is not bound to follow a particular course of conduct, is a classic case of form being exalted over substance.

In United States v. White, 524 F.2d 1249 (5th Cir. 1975),the Fifth Circuit has held that where the mistrial is based on misconduct of the defense calculated to necessitate a mistrial the defendant is barred from relying on the double jeopardy clause to prevent his retrial. In the words of the court:

"This case is analogous to one in which the defendant moves for a mistrial or in which he engages in conduct calculated to necessitate a mistrial, knowing that such actions will result in the empanelling of another jury. In such a situation, where the mistrial is not attributable to prosecutorial or judicial overreaching, the defendant is barred from relying on a double jeopardy defense. United States v. Jorn, 400 U.S. 470, 485, 91 S.Ct. 547, 27 L.Ed. 2d 543 (1971); United States v. Dinitz, 5 Cir. 1974, 492 F.2d 53, 57, aff'd en banc, 504 F.2d 854, cert. granted, 420 U.S. 1003, 95 S.Ct. 1445, 43 L.Ed.2d 761 (1975); United States v. Beasley, 5 Cir. 1973, 479 F.2d 1124, cert. denied, 414 U.S. 924, 94 S.Ct. 252, 38 L.Ed.2d 158; United States v. Iacovetti, 5 Cir. 1972, 466 F.2d 1147, cert. denied, 410 U.S. 908, 93 S.Ct. 963, 35 L.Ed.2d 270; United States v. Romano, 5 Cir. 1973, 482 F.2d 1183, cert. denied sub nom., Yassen v. United States, 414 U.S. 1129 94 S.Ct. 866, 38 L.Ed.2d, 753; McNeal v. Hollowell, 5 Cir. 1973, 481 F.2d 1145, cert. denied, 415 U.S. 951, 94 S.Ct. 1476, 39 L.Ed.2d 567."
524 F.2d 1249 at 1252. (Emphasis supplied).

In the instant case defense counsel made extremely prejudicial statements to the jury intending to force a mistrial and so should be precluded from now asserting that the double jeopardy clause bars the retrial of the defendant. The Ninth Circuit did not consider in its holding the fact that the misconduct of defense counsel caused the mistrial. The State of Arizona contends that if this fact had been properly considered as it was in White, supra, and Dinitz, supra, by the Ninth Circuit a different decision would have been reached.

Based on the conflicts between the Ninth Circuit and other Circuit Courts of Appeal, the Writ of Certiorari to review the decision below should be granted.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted this 17 day of February, 1977.

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A P P E N D I X

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF ARIZONA,
W. COY COX, SHERIFF,
PIMA COUNTY, ARIZONA,
Appellants,

vs. No. 75-3634

GEORGE WASHINGTON,JR.,
Appellee.

GEORGE WASHINGTON, JR.,
Cross-Appellant,

vs. No. 75-3689

STATE OF ARIZONA,
W. COY COX, SHERIFF,
PIMA COUNTY, ARIZONA,
Cross-Appellees.

OPINION

[December 3, 1976]

Appeal from the United States
District Court District of
Arizcna

Before: MERRILL, KILKENNY and
ANDERSON, Circuit Judges:

Appendix A

KILKENNY, Circuit Judge:

This appeal concerns the propriety of a retrial of George Washington, Jr. [appellee] following the declaration of a mistrial in state court. The district court conditionally granted the appellee's petition for a writ of habeas corpus pending appeal to this court. We affirm and order the immediate execution of the writ.

FACTS

FIRST TRIAL AND APPEAL

The appellee was charged in the Arizona state court in February of 1971 with murder. Prior to trial, he moved for the production of all Brady[1] materials. When the prosecutor denied having any Brady material in his file, the trial commenced and the appellee was found guilty of first degree murder (May 21, 1971).

On appeal to the Arizona Supreme Court, the case was remanded for a hearing on appellee's motion for a new trial. At the end of the lengthy hearing, the trial judge granted the motion. On the state's appeal, this order was affirmed on which appeal the Arizona Supreme Court held that the suppression of the evidence was clearly prejudicial to the appellee and that a new trial was warranted.

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[1] Brady v. Maryland, 373 U.S.83 (1963).

Subsequently, the appellee filed a motion to dismiss, contending that the double jeopardy clause prohibited his reprosecution and that he had been denied a speedy trial. This motion was denied on December 13, 1974.

SECOND TRIAL, MISTRIAL AND APPEAL

The voir dire for prospective jurors in the second trial began on January 7, 1975. During his voir dire, the prosecutor informed the veniremen that four years had passed since the commission of the crime and that witnesses memories were likely to fade. As an introduction to the notions of impeachment and refreshing recollection, the prosecutor further informed them that many of the witnesses had been involved "in at least two prior proceedings." Defense counsel moved for a mistrial out of the presence of the jury on the basis of, inter alia, the prosecutor's reference to these "two prior proceedings." This motion was denied. During his voir dire of the jury, defense counsel informed the prospective jurors that there had in fact been a prior trial and he asked them to disregard that fact.

The relevant remarks of defense counsel in his opening statement follow:

> "You will hear that that evidence was suppressed and hidden by the prosecutor in that [first] case. You will hear that that evidence was purposely withheld. You will hear that because of the misconduct of the County Attorney at that time and because he withheld evidence, that the Supreme Court of Arizona granted a new trial in this case." [Emphasis supplied.]

Just after the noon recess, taken shortly after these remarks were made, the state moved for a mistrial on the ground that, inter alia, the defense counsel's allegations of prosecutorial misconduct were highly prejudicial and that the state could not get a fair trial. The court expressed concern that the proceedings were turning into a trial of the county attorney's office but, nevertheless, denied the motion.

The state renewed its motion the following morning before the jury was called. After argument by both sides concerning the propriety of defense counsel's mention of the Arizona Supreme Court's memorandum opinion, the court granted the motion, saying:

> "Based upon defense counsel's remarks in his opening statement concerning the Arizona Supreme Court opinion and its effect for the reasons for the new trial, the motion for mistrial will be granted."

On January 24, 1975, the appellee filed a special proceeding in the Supreme Court of Arizona in which he claimed that retrial was barred by both the double jeopardy clause and the due process clause of the United States Constitution. The Supreme Court declined to accept jurisdiction.

On April 4, 1975, the appellee filed a petition for a writ of habeas corpus in the district court. The petition was granted on the ground that the record contained nothing to indicate that the state trial judge found "manifest necessity" for this grant of a mistrial.

From this ruling, and from an additional district court order denying the state's motion to reopen the evidence, all parties have appealed.

ANALYSIS

The constitutional standards for review in mistrial cases were first enunciated by Justice Story in United States v. Perez, 22 U.S. (9 Wheat) 579 (1824):

> ". . . the law has invested courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice

would otherwise be defeated." Id. at 580.

The concepts of "manifest necessity" and the "ends of public justice" are thus firmly embedded in our constitutional history and are central to the solution of all double jeopardy inquiries. United States v. Sanford, ____ U.S. ____ (October 12, 1976), rev'g. 536 F.2d 871 (CA9 1976); United States v. Dinitz, 424 U.S. 600 (1976); Illinois v. Somerville, 410 U.S. 458 (1973).

The power to discharge a jury prior to verdict is discretionary with the trial court, but should be employed only "with the greatest caution, under urgent circumstances, and for very plain and obvious cause; . . ." Perez at 580. As stated in United States c. Jorn, 400 U.S. 470, 485 (1971):

> ". . . the Perez doctrine of manifest necessity stands as a command to trial judges not to foreclose the defendant's option [to take his case to the original jury] until a scrupulous exercise of judicial discretion leads to the conclusion that the ends of public justice would not be served by a continuation of the proceedings." [Emphasis supplied.]

In the absence of clear abuse, we are normally inclined to uphold discretionary orders of this nature. In the usual case, the trial judge has observed the complained-of event, heard counsel, and made specific findings. Under such circumstances, a mistrial declaration accompanied by a finding that the jury could no longer render an impartial verdict would not be lightly set aside.

The facts before us, however, reveal a dissimilar set of circumstances and no findings whatsoever. We agree with the state that the remarks made by defense counsel in his opening statement were improper[2].

---

[2]What the Supreme Court of Arizona said about the conduct of the county prosecutor has no relevance or materiality on the issue of the appellee's innocence/guilt. Furthermore, Rule 48 (c) of the Rules of the Supreme Court of Arizona provides that memorandum decisions ". . . shall not be regarded as precedent nor cited in any court except for the purpose of establishing the defense of res judicata, collateral estoppel or the law of the case."

However, we decline to imply from this impropriety that the jury was completely prevented from arriving at a fair and impartial verdict.

If this was the case, the trial judge should have so found. He at no time, however, indicates the reason(s) why he granted the mistrial. Furthermore, his short order, quoted supra, is not susceptible to any inference that will fill this void. In the absence of any finding by the trial court or any indication that the court considered the efficacy of alternatives such as an appropriate cautionary instruction to the jury, we must conclude that neither of the tests of Perez ("manifest necessity" or "ends of public justice") has been met. We do not hold that these words are talismanic; we hold only that this particular record fails to reveal a "scrupulous exercise of judicial discretion," and that more consideration should have been given to the appellee's "valued right to have his trial completed by a particular tribunal." Jorn at 484-5. We have reluctantly concluded that the double jeopardy clause precludes a retrial of the appellee.

In view of our disposition of this issue, we need not reach the remaining issues advanced by the parties.

AFFIRMED.

MERRILL, Circuit Judge, with whom Judge Anderson concurs, concurring:

I concur with Judge Kilkenny but would like to emphasize the fact that a finding of manifest necessity was not implicit in the order granting mistrial.

The question to which such a finding is directed in a case such as this is whether misconduct was such as to prejudice the jury beyond remedy by a cautionary instruction or other means and thus preclude fair trial by that jury. It is not enough to find that certain conduct was improper. The critical question is the effect of that conduct upon the jury.

Here the greater part of argument on the motion for mistrial was devoted to the question of whether the remarks of defense counsel were improper - whether the Arizona Supreme Court decision could properly be brought to the jury's attention. When the motion for mistrial was first argued the judge, at one point, indicated that if the supreme court decision was not admissible in evidence, and reference to it was therefore improper, he was disposed to grant mistrial. At the conclusion of that argument mistrial was denied, because the court was not ready to rule on admissibility, but state counsel was invited to renew the motion at any appropriate time. The motion was renewed the following day and an Arizona rule of practice was, for the first time, called to the court's attention. It provided that on new trial reference could not be made to the

earlier trial. At the conclusion of argument mistrial was granted. While manifest necessity was also argued on this occasion, absent findings that manifest necessity existed, it is quite possible that the grant of mistrial was based on the fact that the impropriety of counsel's conduct had been established without reaching the question whether there could, nevertheless, be a fair trial.

UNITED STATES COURT OF APPEALS

NINTH CIRCUIT

STATE OF ARIZONA, W. COY COX SHERIFF, PIMA COUNTY, ARIZONA Apellants, v. GEORGE WASHINGTON, JR., Appellee,	)	No. 75-3634
GEORGE WASHINGTON, JR., Cross-Appellant, v. STATE OF ARIZONA, W. COY COX, SHERIFF, PIMA COUNTY, ARIZONA, Cross-Appellees.	)	No. 75-3689 O R D E R

Appeal from the United States District Court, District of Arizona

Before: MERRILL, KILKENNY and ANDERSON, Circuit Judges

The petition for rehearing is denied.

Appendix "B"

The original majority opinion filed December 3, 1976, is amended to delete the word "completely" on line 3, page 5.

The issuance of the mandate is stayed for a period of 20 days from the date of the filing of this order.

Appendix "B"

Office of the Clerk

United States Court of Appeals for

the Ninth Circuit

December 3, 1976

RE: C.A. No. 75-3634 GEO. WASHINGTON, JR.,
V. STATE OF ARIZONA

An opinion was filed and a judgment entered in the above case today, AFFIRMING the judgment of the court below (or administrative agency).

You have (14) days, from the above date, in which to file a petition for rehearing.

The mandate of this court shall issue (21) days after entry of judgment unless the court enters an order otherwise. If a petition for rehearing is filed and denied, the mandate will issue (7) days after the entry of the order denying the petition.

Sincerely,

Emil E, Melfi, Jr.
Clerk of the Court

Appendix "C"

IN THE UNITED STATES DISTRICT

COURT FOR THE DISTRICT OF ARIZONA

GEORGE WASHINGTON, JR., Petitioner, vs. THE STATE OF ARIZONA WILLIAM C. COX, SHERIFF Pima County, Arizona Respondent.	No:CIV. 75-85 TUC (JAW) O R D E R

The verified petition of petitioner, George Washington, Jr., for a writ of habeas corpus having been presented to the court, and a hearing having been had thereon, and it appearing to the court that the petitioner is detained by the respondent, The State of Arizona, William C. Cox, Sheriff, Pima County, Arizona, in violation of the provisions of the United States Constitution.

Appendix "D"

IT IS ORDERED that the petition of George Washington, Jr., for a writ of habeas corpus be and the same hereby is granted, and

IT IS FURTHER ORDERED that the execution of said writ shall be stayed until December 1, 1975, to enable the State of Arizona to appeal to the United States Court of Appeals for the Ninth Circuit.

DATED: October, 17, 1975.

James A. Walsh
United States District Judge

Appendix "D"

SUPREME COURT

State of Arizona

July 15, 1975

GEORGE WASHINGTON, JR., Petitioner, v. STATE OF ARIZONA, W. COY COX, SHERIFF, PIMA COUNTY, ARIZONA, Respondent,	Supreme Court No. H-688 Pima County No. A-18980

The following action was taken by the Supreme Court of the State of Arizona on July 14, 1975, in regard to the above-entitled cause:

"ORDERED: Petition for Writ of Habeas Corpus = DENIED."

Clifford H. Ward, Clerk
By Mary Hopkins,
Deputy Clerk

Appendix "E"

IN THE SUPERIOR COURT OF THE STATE
OF ARIZONA
County of Pima, State of Arizona

BEN C. BIRDSALL
Judge

NO: A-18980
June 16, 1975

State of Arizona
Plaintiff

George Washington, Jr.
Defendant

MINUTE ENTRY

UNDER ADVISEMENT RULING

ORDERED that Defendant's Motion to Quash is Denied.

Copies to:

county Attorney
Ed Bolding
Court Adm.
Pima County Sheriff

Marguerite B. Wade,
Deputy Clerk

Appendix "F"

SUPREME COURT

State of Arizona

February 13, 1975

GEORGE WASHINGTON, JR., Petitioner, v.	)	Supreme Court NO. 11921
SUPERIOR COURT OF THE STATE OF ARIZONA, IN AND FOR THE COUNTY OF PIMA, AND THE HONORABLE BEN BIRDSALL, PRESIDING JUDGE, THE HONORABLE ALICE TRUMAN AND THE HONORABLE ROBERT BUCHANAN, JUDGES OF THE SUPERIOR COURT, PIMA COUNTY, ARIZONA, Respondents, and THE STATE OF ARIZONA, Real Party in Interest	)	Pima County No. A-18980

The following action was taken by the Supreme Court of the State of Arizona on February 11, 1975, in regard to the above-entitled cause:

"ORDERED: The Court declines to accept jurisdiction of the Petition for Special Action."

Clifford H. Ward, Clerk
By Mary Hopkins, Deputy

Appendix "G"

Rule 48(c), 17 A.R.S. Arizona Rules of the Supreme Court provides:

> "Dispositions as precedent.
>
> Memoranda decisions shall not be regarded as precedent nor cited in any court except for the purpose of establishing the defense of res judicata, collateral estoppel or the law of the case."

Rule 314, 17 A.R.S. Arizona Rules of Criminal Procedure provides:

> "When a new trial is granted, the new trial shall proceed in all respects as if no former trial had been had. On the new trial the defendant may be convicted of any offense charged in the indictment or information regardless of the verdict or finding on the former trial. The former verdict or finding shall not be used or referred to in evidence or argument on the new trial."

Udall, Arizona Law of Evidence, § 111 at 201 (1960):

> "The first block of evidence ruled out is that which has no bearing on the matters in dispute in the trial, and therefore cannot aid the trier of fact."

Appendix "H"

STEPHEN D. NEELY
PIMA COUNTY ATTORNEY
900 Pima County Courts Building
111 West Congress Street
Tucson, Arizona 85701
Telephone: 792-8411

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

NO._____

STATE OF ARIZONA, RICHARD BOYKIN,
SHERIFF, PIMA COUNTY, ARIZONA

Petitioner,

-vs-

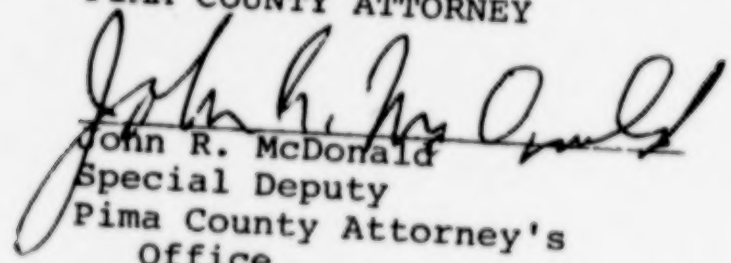
GEORGE WASHINGTON, JR.,

Respondent.

NOTICE OF APPEARANCE

The Clerk will enter my appearance as Counsel for the Petitioner.

STEPHEN D. NEELY
PIMA COUNTY ATTORNEY

By: 

John R. McDonald
Special Deputy
Pima County Attorney's Office
900 Pima County Courts Building
111 W. Congress Street
Tucson, Arizona 85701

The Clerk is requested to notify counsel of action of the Court by means of letter.